

On July 26, 2016, Alex Nguyen (“Mr. Nguyen”) filed with this Commission a formal complaint against Celco Partnership & Affiliated Entities d/b/a Verizon Wireless (“Verizon”)

under section 208 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 208.¹ Counsel for Verizon has confirmed that Verizon has already received a copy of the Complaint that Mr. Nguyen served by email.

The Commission has promulgated comprehensive rules regarding formal complaints. *See* 47 C.F.R. §§ 1.720-1.736. *See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) (“*Formal Complaints Order*”), Order on Reconsideration, 16 FCC Rcd 5681 (2001) (“*Formal Complaints Recon Order*”). We strongly encourage the parties to read the formal complaint rules, the *Formal Complaints Order*, and the *Formal Complaints Recon Order* fully and carefully.

Pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3, 1.724, 1.726, 1.729, and 1.733 of the Commission’s rules, 47 C.F.R. §§ 1.3, 1.724, 1.726, 1.729, 1.733, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, we modify and extend certain of the filing deadlines and other requirements set forth in the formal complaint rules, as specified below.

In response to a request from Mr. Nguyen, we have waived certain procedural requirements in rules 1.721(a)(5), (6), (10) and 1.735(c), 47 C.F.R. §§ 1.721(a)(5), (6), (10) and 1.735(c).² We also waive the portions of sections 1.726(a) and 1.729(a) of the Commission’s rules that limit the complainant to addressing, in its reply and supplemental interrogatories, only the “specific factual allegations and legal arguments made by the defendant *in support of its affirmative defenses*.” 47 C.F.R. §§ 1.726(a), 1.729(a) (emphasis added). Instead, **Mr. Nguyen must file a reply**, and the reply **must** address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. The supplemental interrogatories (if any) may address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. This waiver will expedite our consideration of this matter by accelerating the creation of a full record. During the initial status conference, we will, as always, consider any request by Verizon for an opportunity to respond to the reply.

Moreover, we waive the portions of sections 1.724(c) and 1.726(c) of the Commission’s rules, 47 C.F.R. §§ 1.724(c) and 1.726(c), that require an answer and reply to contain proposed findings of fact and conclusions of law. Experience has shown that proposed findings of fact and conclusions of law included in these pleadings are of limited value. The answer and reply still must include comprehensive factual support and a thorough legal analysis, as required in sections

¹ Complaint, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed July 26, 2016) (“Complaint”). We note that certain claims in the Complaint, alleging violations of sections 8.3, 8.5 and 8.11 of the Commission’s Open Internet rules, 47 C.F.R. §§ 8.3, 8.5 and 8.11, are governed by the procedural rules at 47 C.F.R. §§ 8.12-16. In the interest of simplicity, we will utilize the section 208 procedural rules in this proceeding.

² *See* Letter from Rosemary H. McEnery, Deputy Chief, Market Disputes Resolution Division, to Alex Nguyen and to David Haga, Counsel for Verizon (dated Feb. 2, 2016) (granting in part and denying in part Mr. Nguyen’s waiver request) (Attachment A); Letter from Alex Nguyen to Christopher Killion, Chief, Market Disputes Resolution Division, *et al.* (dated Jan. 20, 2016) (requesting a waiver of certain requirements of the Commission’s formal complaint rules) (Attachment B); Letter from David Haga, counsel for Verizon, to Rosemary H. McEnery, Deputy Chief, Market Disputes Resolution Division (commenting on Mr. Nguyen’s waiver request) (Attachment C).

1.724(b)-(c) and 1.726(a), (c) of the Commission's rules, 47 C.F.R. §§ 1.721, 1.724(b)-(c) and 1.726(a), (c).

In accordance with the formal complaint rules, as modified above, we establish the following schedule for this proceeding:³

1) On or before September 6, 2016, Verizon shall file and serve its request for interrogatories, if any, and shall file and serve any opposition and objections to Mr. Nguyen's request for interrogatories, if any. 47 C.F.R. § 1.729.

2) Verizon shall, on or before September 6, 2016 file and serve an answer to the Complaint that complies with this Notice of Formal Complaint and 47 C.F.R. § 1.724. Responses to any motions filed with the Complaint shall be submitted with the answer.⁴

3) Mr. Nguyen shall, on or before October 6, 2016, file and serve a reply to the answer that complies with 47 C.F.R. § 1.726.

4) Mr. Nguyen shall, on or before October 6, 2016, file and serve his second request for interrogatories, if any, and file and serve any opposition and objections to Verizon's request for interrogatories, if any. 47 C.F.R. § 1.729.

5) Verizon shall, on or before October 13, 2016, file any opposition and objections to Mr. Nguyen's second request for interrogatories, if any. 47 C.F.R. § 1.729.

6) An initial status conference in this proceeding has been scheduled for November 16, 2016 at the Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. We strongly encourage each party to have present at the conference a representative with knowledge of the central facts and authority to settle the dispute. After clearing security at the 12th Street entrance, the parties should call Michael Engel at 418-1516 to be escorted to the conference. *See* 47 C.F.R. § 1.733. **The parties should be prepared to spend at least four hours in conference.**

7) The parties shall meet prior to attending the initial status conference. One purpose of that meeting is to resolve or narrow as many issues as possible prior to the conference. The parties shall discuss matters including, but not limited to, settlement prospects, discovery, factual and legal issues in dispute, pleading schedules, and the creation of a joint statement of stipulated facts, disputed facts, and key legal issues. *See* 47 C.F.R. § 1.733(b)(1).

³ In the event that either or both parties seek to modify any of the dates listed here, they should confer with the other party and try to reach agreement on an alternative schedule and then jointly propose it (in writing) to Commission staff. If, after consultation, the parties cannot agree, a party may seek a change in the schedule by filing a motion under 47 C.F.R. § 1.727.

⁴ Except in rare circumstances, *motions to dismiss should not be filed*. *Formal Complaints Recon Order*, 16 FCC Red at 5696 ("We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases...[T]he Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint...[W]e remind defendants that the grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.").

8) The parties shall file a joint statement of all proposals agreed to and any disputes remaining with respect to the matters listed in 47 C.F.R. § 1.733(b)(1)(i)-(iv) as a result of the parties' meeting. At the same time, the parties also shall submit a joint statement of stipulated facts, disputed facts, and key legal issues. *See* 47 C.F.R. §§ 1.732(g), 1.733(b)(1)(v), 1.733(b)(2). Both joint statements must be filed and served on or before October 26, 2016. *See* 47 C.F.R. § 1.733(b)(2). The parties may submit these two joint statements in a single document, as long as each is separately identified therein. **We strongly encourage the parties to devote substantial effort to developing comprehensive and detailed joint statements.** *See Formal Complaints Recon Order*, 16 FCC Rcd at 5696-97.

9) The parties shall file a public version of all written submissions in this proceeding using the Commission's Electronic Comment Filing System (ECFS). All written submissions shall (a) prominently contain the Proceeding Number and Bureau ID Number referenced above (*see, e.g.*, 47 C.F.R. § 1.7), and (b) be addressed to the Commission Secretary. If a party seeks to file both a public version and a confidential version of a submission, it must file the public (redacted) version on ECFS and file the confidential (unredacted) version in hard copy form with the Office of the Commission Secretary. *See* 47 C.F.R. § 1.731. In addition to filing the unredacted version with the Office of the Secretary, we request that the parties provide three additional unredacted hard copies marked as "Courtesy Staff Copies. EB-MDRD, 202-418-7330". *See* 47 U.S.C. § 154(i); 47 C.F.R. § 1.735(e). The parties shall serve on one another all filings via e-mail, hand-delivery, or overnight delivery, together with a proof of all such service. *See* 47 C.F.R. § 1.735(f). In addition, the parties shall send to the Commission staff identified below email courtesy copies of all filings (both public versions and confidential versions) in a format that permits full text searching. *See* 47 U.S.C. § 154(i); 47 C.F.R. § 1.735(e). *See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, Order, 29 FCC Rcd 14078, 14081, para. 11 (requiring parties to provide hard copies of submissions to Commission staff upon request).

The parties should note that this proceeding is restricted for *ex parte* purposes pursuant to 47 C.F.R. Part 1, Subpart H. Further, the parties shall retain all records that may be relevant to the complaint, including electronic records, until the Commission's decision in this proceeding is final and no longer subject to judicial review. *See* 47 U.S.C. §§ 154(i), 208(a); 47 C.F.R. § 42.7.

Commission staff assigned to this matter are: Lisa Saks (counsel): (202) 418-7335 (phone) and lisa.saks@fcc.gov; Michael Engel (counsel): (202) 418-1516 (phone) and michael.engel@fcc.gov; and Sandra Gray-Fields (administrative): (202) 418-0961 and sandra.gray-fields@fcc.gov.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3 and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Lisa Saks", written in a cursive style.

Lisa Saks
Assistant Division Chief
Market Disputes Resolution Division

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
445 12th St., S.W.
Washington, D.C. 20554

February 2, 2016

Copy by Email; Original by U.S. Mail

Alex Nguyen
1050 Kiely Blvd. # 2608
Santa Clara, CA 95055

David Haga
Verizon
1320 N. Courthouse Road
Arlington, VA 22201

Re: Request For Waiver – Alex Nguyen

Counselors:

In this letter, we grant in part, and deny in part, Mr. Nguyen's request for waiver of certain formal complaint procedural rules. Mr. Nguyen has indicated that he intends to file a formal complaint against Celco Partnership & Affiliated Entities d/b/a Verizon Wireless (Verizon) alleging violations of 47 C.F.R. § 27.16 (C-block rules), 47 C.F.R. § 8.3 (transparency), and certain provisions of the 2015 Open Internet Order.¹ Mr. Nguyen requests that we apply the procedural rules at 47 C.F.R. §§ 8.12-16, rather than those at 47 C.F.R. §§ 1.720-36, and in any event, that we waive sections 1.721(a)(5), (6), and (10) and 1.735(c) for purposes of his complaint filing.²

Formal complaints alleging violations of the C-block rules are subject to the procedural rules at 47 C.F.R. §§ 1.720-36.³ Complaints alleging violations of the transparency rule and the 2015 Open Internet Order are governed by the procedural rules at 47 C.F.R. §§ 8.12-16. To the extent Mr. Nguyen intends to include a claim under the C-block rules in his complaint, he must utilize the somewhat more comprehensive complaint procedural rules at 47 C.F.R. §§ 1.720-36.

Both sets of formal complaint rules are designed not only to provide defendants with adequate notice of a claim, but also to ensure development of a complete record on which the Commission may issue a ruling. In addition, the rules are intended to provide due process to all parties involved.

¹ Letter from Alex Nguyen to Christopher Killion, FCC (dated Jan. 20, 2016).

² *Id.*

³ See *In the Matter of Serv. Rules for the 698-746, 747-762 & 777-792 MHz Bands*, Second Report and Order, 22 F.C.C. Rcd. 15289, 15364 ¶ 229, n517 (2007).

In an effort to accommodate Mr. Nguyen, who is proceeding *pro se*, however, we waive the following provisions as requested:

- 47 C.F.R. § 1.721(a)(5), to the extent it requires complainant to provide an affidavit explaining the basis for any allegation made on information and belief. Complainant, however, must comply with the remaining portions of 1.721(a)(5) requiring, among other things, that the complaint contain a complete statement of facts which, if proven true, would constitute a violation; that all material facts be supported by relevant affidavits and documentation; and that the statement of facts include a detailed explanation of the manner and time period in which the defendant has allegedly violated the Commission order or rule in question.
- 47 C.F.R. § 1.721(a)(6), to the extent it requires that the complaint contain proposed findings of fact and conclusions of law. The complaint, however, must contain a legal analysis.
- 47 C.F.R. § 1.721(a)(10).
- 47 C.F.R. § 1.735(c), requiring hand-delivery of the complaint. Verizon has agreed to accept service by e-mail.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3, 1.724, 1.726, 1.729, and 1.733 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.724, 1.726, 1.729, 1.733, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.3114(i).

Sincerely,

A handwritten signature in black ink, appearing to read 'RH McEnery', with a large, stylized loop at the end.

Rosemary H. McEnery
Deputy Chief
Markets Disputes Resolution Division
Enforcement Bureau

cc: Tamara Priess, Verizon
Christopher Killion, FCC

ATTACHMENT B

January 20, 2016

Christopher Killion, Chief
Rosemary McEnery, Deputy Chief
Lisa Griffin, Deputy Chief
Market Disputes Resolution Division, Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for a Waiver of Certain Requirements of the Commission's Rules for Formal Complaints.

Dear Mr. Killion, Ms. McEnery, and Ms. Griffin:

Pursuant to 47 CFR § 1.3, I respectfully submit this petition for a waiver of certain requirements of the Commission's rules for formal complaints. I intend to file a formal complaint against Cellco Partnership & Affiliated Entities d/b/a Verizon Wireless ("Verizon") for unreasonably interfering with and disadvantaging end users' ability to select, access, and use the applications, services, and devices of their choice, and edge providers' ability to make applications, services, and devices available to end users:

- Verizon blocked end users from ordering new SIM cards for compatible third-party devices. For example, even though Verizon sells the same models other carriers and retailers sell, Verizon blocked third-party Apple iPhone 6 and 6 Plus devices for 47 weeks and Motorola Nexus 6 devices for 29 weeks.
- Verizon imposed discriminatory pricing on end users who brought their own compatible devices and used existing SIM cards.¹
- Verizon blocked Samsung from preloading Microsoft applications, including OneDrive (which competes with Verizon Cloud),² and Samsung Pay (which competes with Android Pay, a service backed by Verizon)³ on Samsung devices.
- Verizon has repeatedly failed its transparency obligations. For example, before eventually "certifying" third-party Motorola Nexus 6 devices, Verizon alleged the

1 Shawn De Cesari. *[Shocker] Even After Launching The Nexus 6, Verizon Still Won't Officially Activate One That Wasn't Purchased From The Carrier*. <http://www.androidpolice.com/2015/03/28/shocker-even-after-launching-the-nexus-6-verizon-still-wont-officially-activate-one-that-wasnt-purchased-from-the-carrier/> ["So, if you want the privilege of using a non-Verizon device on its network, you could be stuck paying a full \$40 monthly access fee on top of your data plan, rather than \$15 or \$25 as you would with a recognized device."]

2 Shira Ovide. *Verizon and AT&T Won't Pre-Install Three Microsoft Apps on Samsung S6*. <http://blogs.wsj.com/digits/2015/04/15/verizon-and-att-wont-pre-install-three-microsoft-apps-on-samsung-s6/>

3 Chris Welch. *Samsung Pay launches in the United States*. <http://www.theverge.com/2015/9/28/9408749/samsung-pay-united-states-launch> [Almost all of the major carriers do already support it, though. The only holdout is Verizon, which continues to say that it is "in the process of evaluating Samsung Pay."]

existence of vague software variations but neither specified them nor provided any evidence that they harmed its network.

All of Verizon's conduct specified above is subject to Section 27.16 (and Section 8.3) of the Commission's rules; some of Verizon's conduct is additionally subject to similar openness rules set forth by the *2015 Open Internet Order* that took effect on June 12, 2015. Because some of Verizon's conduct occurred before June 12, 2015, Enforcement Bureau staff suggested that I should consider a Section 208 formal complaint (pursuant to 47 CFR §§ 1.720–1.736) instead of an Open Internet formal complaint (pursuant to 47 CFR §§ 8.12–8.16). However, the procedural rules for Section 208 formal complaints are more burdensome:

The section 208 rules, for example, require complainants to submit information designations, proposed findings of fact and conclusions of law, and affidavits demonstrating the basis for complainant's belief for unsupported allegations and why complainant could not ascertain facts from any source. See, e.g., 47 C.F.R. §§ 1.721(a) (5), (6), (10). The open Internet formal complaint rules do not contain similar requirements.⁴

As the Commission recognized in the 2015 Open Internet Order, complainants are likely to be consumers with limited resources.⁵

Because the Commission adopted its Section 27.16 rules before its Part 8 rules and because Sections 8.3–8.11 and 27.16 set forth similar openness rules, I respectfully ask the Commission to apply less burdensome procedural rules and waive both 47 CFR §§ 1.721(a) (5), (6), (10) and also 47 CFR §§ 1.735(c), requiring complainants to serve complaints by hand delivery. (I intend to serve the complaint by e-mail.)

Respectfully submitted,



Alex Nguyen
1050 Kiely Blvd #2608
Santa Clara, CA 95055
communicator@doubleperfect.com

⁴ 30 FCC Rcd. 5713 note 652 (2015)

⁵ *Id.* at 5713 ¶ 252 [“Although comparable to the section 208 formal complaint rules, the open Internet rules are less burdensome on complainants, who in this context are likely to be consumers or small edge providers with limited resources.”]

ATTACHMENT C



David Haga
Assistant General Counsel

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T (703) 351-3065

January 21, 2016

Rosemary McEnery
Federal Communications Commission
445 12th Street, SW
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Rosemary.McEnery@fcc.gov

Re: Request for Waiver (Alex Nguyen)

Dear Ms. McEnery:

I am writing in response to your January 20, 2016 email to Tamara Preiss, in which you sought comment from Verizon regarding a request for waiver that Alex Nguyen submitted to the Commission. Mr. Nguyen sought waiver of certain rules associated with the filing of a formal complaint that he indicated he wished to file against Verizon.

To the extent Mr. Nguyen is seeking to assert claims under the *2015 Open Internet Order* and/or 47 CFR §§ 8.3-8.11, Verizon certainly has no objection to proceeding under 47 CFR §§ 8.12-8.16 for those claims. However, to the extent Mr. Nguyen is seeking to assert claims for conduct prior to the effective date of the *2015 Open Internet Order* and/or the Part 8 rules, Verizon cannot agree that those rules and standards should apply retroactively – either as a matter of substance or procedure.

Similarly, if Mr. Nguyen intends to assert claims under 47 CFR § 27.16, Verizon believes that it is appropriate to proceed under the formal complaint procedures provided for in the rules (47 CFR § 1.721) for alleged violations of that section. As a general matter, these formal complaint procedures serve an important gatekeeping function to ensure that only potentially viable claims are brought before the Commission and that neither the Commission nor respondents are inundated with meritless or vexatious complaints. Likewise, these procedures ensure that a respondent has sufficient notice of the relevant facts and legal theories asserted against it, such that it can prepare an adequate defense. For example, it is essential that any complainant comply with the requirement under 47 C.F.R. §§ 1.721(a)(5) to provide a complete statement of facts which, if proven true, would constitute an actionable violation. Likewise, any complainant must present a legal analysis relevant to the claims and arguments set forth in the complaint as required by 47 C.F.R. §§ 1.721(a)(6).

That said, if Mr. Nguyen seeks to assert claims under the formal complaint procedures in 47 CFR § 1.721 and reasonably believes that any particular aspects of those procedures may be burdensome in this case, Verizon is willing to discuss

those particular aspects and see if some sort of accommodation can be made. For example, Mr. Nguyen specifically referred to 47 CFR § 1.735, which requires service of the complaint by hand delivery. Verizon is willing to waive any such service requirements in this case and accept service of any complaint by email.

Thank you for your consideration. Please let me know if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "DHaga", enclosed within a thin black rectangular border.

David Haga

cc: Alex Nguyen
Christopher Killion
Adam Suppes
Tamara Preiss